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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

INGE MARIA KAHL, Special Administrator of the Estate of HANS JURGEN KAHL, deceased, et al.,

Petitioners,

VS.

AMERICAN AIRLINES, INC. and McDONNELL DOUGLAS CORPORATION,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SUPPLEMENT TO THE STATEMENT OF THE CASE

The Petition for Writ of Certiorari was filed on behalf of these petitioners on June 29, 1983. On August 30, 1983, the Illinois Supreme Court adopted new Rule 20, providing for certification of questions of state law from certain federal courts. This rule is effective October 1, 1983. Petitioners file this Supplemental Brief pursuant to Rule 22.6 of this Court to bring this rule to the attention of this Court since it was not available to or known by the petitioners at the time of the initial filing. A copy of Rule 20 of the Illinois Supreme Court is attached as an exhibit to this Supplemental Brief.

ARGUMENT

THIS COURT SHOULD CONSIDER CERTIFICATION TO THE ILLINOIS SUPREME COURT OF THE ISSUES OF ILLINOIS LAW RAISED IN THE OPINION OF THE SEVENTH CIRCUIT UNDER A RULE RECENTLY ADOPTED BY THE ILLINOIS SUPREME COURT.

In the opinion of the United States Court of Appeals for the Seventh Circuit from which petitioners seek a Writ of Certiorari, the Court was forced to speculate as to just how the Illinois Supreme Court would rule as to the question of admissibility of evidence of a decedent's tax liability and also as to how that Court would rule on whether or not the jury could be instructed that its award of damages would not be subject to federal income taxation. As to the first issue, the opinion of the Seventh Circuit states that the "Illinois Supreme Court has never decided whether evidence of the hypothetical tax liability of lost earnings is admissible in wrongful death cases." (App. 9) The latter question is disposed of by the Court of Appeals by noting that while it is "clear that under current Illinois Practice it is proper to refuse to instruct a jury that a damage award in a wrongful death case (by whatever means it is computed) will not be subject to taxation" (App. 15), those intermediate Illinois reviewing Court decisions which have so held base their decisions on the rationale and reasoning of the Illinois Supreme Court in decisions which predate the opinion of this Court in *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490 (1980) and thus the reasoning in those decisions was "based on a mistaken view of federal law." (App. 19)

At the time this cause was submitted to the Court of Appeals for decision, no procedure existed by which that Court could certify questions of Illinois law to the Illinois

Supreme Court for resolution. As a result, although a question arose during the course of oral argument as to whether or not this issue *should* be submitted for certification to the Illinois Supreme Court, the Court of Appeals could not do so since the Illinois Supreme Court had no provision for such certification in its rules and had refused to allow this procedure in the past.[1]

The Petition for Writ of Certiorari was filed by these petitioners on June 29, 1983. On August 30, 1983, the Illinois Supreme Court adopted new Rule 20, effective October 1, 1983. The rule provides in pertinent part as follows:

> "Rule 20. Certification of Questions of State Law From Certain Federal Courts
>
> (a) Certification. When it shall appear to the Supreme Court of the United States, or to the United States Court of Appeals for the Seventh Circuit, that there are involved in any proceeding before it questions as to the law of this State, which may be determinative of the said cause, and there are no controlling precedents in the decisions of this court, such court may certify such questions of the laws of this State to this court for instructions concern-

[1] The question of certification was raised by Circuit Judge Coffey during the course of oral argument. Judge Coffey questioned counsel representing one of the plaintiffs before the Court as to whether or not the issues then before the Court of Appeals could be certified to the Illinois Supreme Court. Counsel for plaintiff advised Judge Coffey that he was familiar with the Rules of the Illinois Supreme Court as they existed at that time and further advised the Court that no certification was possible under those rules. This was confirmed by counsel for one of defendants during his responsive argument to the Court. (See affidavit of Attorney David A. Novoselsky, attached to this Supplemental Brief.)

ing such questions of State law, which certificate this court, by written opinion, may answer."

The Committee Comments adopted along with Rule 20 state that it was the intention of the Illinois Supreme Court in adopting this rule to permit "the Supreme Court of the United States or the United States Court of Appeals for the Seventh Circuit to certify a question of Illinois law to the Supreme Court of Illinois, which question may be controlling in an action pending before said court and upon which no controlling Illinois authority exists." These Comments further note that the Seventh Circuit has a rule "which encourages certification in jurisdictions that have a rule similar to the one provided herein."

Petitioners respectfully submit that the issues raised in this cause are particularly appropriate for certification to the Illinois Supreme Court. (Indeed, had certification been possible at the time this cause was presented to the Court of Appeals, that Court would in all likelihood have certified these questions of state law to the Illinois Supreme Court either on motion of the parties or *sua sponte*.) However, since the Illinois Supreme Court did not then have such a provision in its rules, the Court of Appeals could not do so.[2] Such certification is now possible, and should be considered by this Court.

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[2] Rule 13 of the United States Court of Appeals for the Seventh Circuit states that when the "rules of the highest court of a state *provide for certification to that court* by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision on the question certified." (Emphasis supplied.)

Without restating the matters set forth in the Petition for Writ of Certiorari filed by these petitioners, it is respectfully urged that questions of Illinois law predominate in the issues before this Court. This is obvious from a review of the opinion of the Court of Appeals as well as from the petition and the opposing briefs filed by respondents.

The Seventh Circuit resolved the question of the admissibility of evidence by determining that "Illinois' substantive measure of damages is identical to the FELA measure leaving the district court free to admit all evidence relevant to that measure under Fed.R.Evid. 402." (App. 8) In doing so, however, it stated that the Illinois Supreme Court had never "decided whether evidence of the hypothetical tax liability of lost earnings is admissible in wrongful death cases" but was forced to consider this question by distinguishing the pre-*Liepelt* decision of the Illinois Supreme Court in *Hall v. Chicago & Northwestern Railway*, 5 Ill. 2d 135, 125 N.E. 2d 77 (1955) which dealt with this issue, as well as the related issue of jury instructions. (App. 9) The opinion of the Court of Appeals devotes considerable time to reviewing the *Hall* decision, and to analyzing its reasoning and rationale to allow the Court of Appeals to predict how the Illinois Supreme Court might rule on this issue if presented to it in light of the *Liepelt* decision. (See generally App. 9-15, and most particularly the Court's comments at App. 12, where it notes that "we cannot assume that the Illinois Supreme Court would be content to follow its dictum [in *Hall*] based on the then—unanimous state rule" and at App. 14, where the Court stated that "we may predict that this is the course the Illinois Supreme Court would endorse *or the issue presented to it.*" (Emphasis supplied.)) Resolving the issue of jury instructions, the Court

again discussed the *Hall* case in detail, and rejected several "post-*Liepelt* Illinois appellate decisions [which] confirmed the vitality of *Hall* and *Raines* [*Raines v. New York Central Railroad*, 51 Ill. 2d 428 (1972)] in actions based on state law" as those cases dealt with the issue of jury instructions since the Court of Appeals found that "Illinois practice does not bind the federal courts under *Erie* because, *so far as we can determine from the cases* Illinois' concerns are either procedural or based on a mistaken view of federal law." (App. 16, 19. Emphasis supplied.)

The opinion of the Court of Appeals which petitioners now seek to bring before this Court is clearly dependent upon that court's view of how the Illinois Supreme Court would rule if presented with the same issues. Since the Court of Appeals could not certify this question to the Illinois Supreme Court under its own rules in the absence of any certification provision in the rules of the Illinois Supreme Court, it was forced to speculate and conjecture as to precisely how the Illinois Supreme Court would have ruled if presented with these issues.[3] In doing so, petitioners believe that the Court of Appeals reached a result which is contrary to Illinois law and contrary to the interpretation of that state's law by its own courts. This

[3] The dilemma faced by the Court of Appeals is interwoven throughout the fabric of its opinion. A further example of this may be seen in the statement contained in footnote 7 of the Court's opinion, where a portion of the opinion is qualified by the statement that "[o]ur conclusion would be different if Illinois interpreted its own substantive law to include a right to such a possible bonus. It is only because the result in *Hall seems* to depend on its view of the requirements of federal law (a characterization reinforced by the Illinois Supreme Court's abstract formulation of the measure of damages in wrongful death cases) that we find it not controlling." (App. 17)

problem, and indeed the necessity for speculating as to precisely how the Illinois Supreme Court would have ruled had these issues been presented to it, could have been avoided had the Court of Appeals been given the opportunity to certify these questions to the Illinois Supreme Court for resolution. However, at the time this matter was raised by the Court itself, no provision to do so existed. That provision now exists, and petitioners would urge that this Court consider doing what the Court of Appeals could not do.

Petitioners submit that there can be no question but that this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938) established a firm policy providing for a uniform interpretation of issues of state law in both the federal and state court systems. As this Court commented in *Day & Zimmerman, Inc. v. Challnor, et al.*, 423 U.S. 3 (1975), the "accident of diversity of citizenship" should not be permitted to "disturb equal administration of justice in coordinate state and federal courts sitting side by side." (423 U.S. at 4.) Petitioners submit that in this cause, the opinion of the United States Court of Appeals for the Seventh Circuit raises the likelihood of just such disparate treatment that *Erie* and its progeny were intended to eliminate, with the coordinate state and federal courts in Illinois quite literally sitting "side by side" but interpreting issues of state law in an entirely different manner. Rather than have the "accident of diversity of citizenship" govern just how a party seeking to recover under Illinois law is to be treated, petitioners urge that this Court, as an alternative to hearing argument in this cause without the benefit of the assistance and guidance of the Illinois Supreme Court on issues of its own substantive law, consider certifying the question raised here to the Illinois Supreme Court under

its newly enacted Rule 20. Petitioners believe that not only the parties to this litigation will benefit from such certification, but that such a decision will act as important and guiding precedent to other federal courts which are faced with a decision as to whether they should resolve issues of state law in the absence of guiding precedent from that state's highest court or whether such a decision should be certified to the state court system for resolution.

CONCLUSION

The recent enactment by the Illinois Supreme Court of Rule 20 provides a means by which this Honorable Court can allow the Illinois Supreme Court to state its own position on these substantial and significant issues of Illinois law. The United States Court of Appeals for the Seventh Circuit could not take advantage of the possibility of certification under its own rules based on the lack of a certification procedure under the rules of the Illinois Supreme Court. As a result, the Court of Appeals was forced to speculate as to how the Illinois Supreme Court *would* have resolved these issues *had* they been presented to that body. Recognizing that the rules of the Seventh Circuit encourages such certification, and recognizing the need of the federal court system to have questions which "may be controlling in an action pending before said court and upon which no controlling Illinois authority exists" reviewed and passed upon by the Illinois Supreme Court, Rule 20 was adopted by the Illinois Supreme Court. Petitioners urge that this Court consider certifying these

issues to that court under this rule as an alternative to the relief requested in the Petition for Writ of Certiorari filed by petitioners on June 29, 1983.

Respectfully submitted,

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APPENDIX CONTAINING EXHIBITS

3149

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

Order entered August 30, 1983.

(New material is underscored except where the entire rule is new. Deleted material is struck through.)

Effective October 1, 1983, new Rule 20 is adopted and Rule 361(c) is amended as follows:

New Rule 20

Rule 20. Certification of Questions of State Law From Certain Federal Courts

(a) Certification. When it shall appear to the Supreme Court of the United States, or to the United States Court of Appeals for the Seventh Circuit, that there are involved in any proceeding before it questions as to the law of this State, which may be determinative of the said cause, and there are no controlling precedents in the decisions of this court, such court may certify such questions of the laws of this State to this court for instructions concerning such questions of State law, which certificate this court, by written opinion, may answer.

(b) Contents of Certification Order. A certification order shall contain:

(1) the questions of law to be answered; and

(2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

(c) Record Before Certifying Court. This court may require the original or copies of all or of any portion of the record before the certifying court to be filed with it, if, in the opinion of this court, the record or a portion thereof may be necessary in answering the questions.

(d) Briefs and Argument. Proceedings in this court shall be those provided in these rules governing briefs and oral arguments, except that the time for filing briefs specified in Rule 343 begins to run from the day the certification order is filed with this court, and the parties retain the same designation as they have in the certifying court.

(e) Costs of Certification. Fees and costs shall be the same as in civil appeals docketed before this court and shall be equally divided between the parties unless otherwise ordered by the certifying court.

Adopted August 30, 1983, effective October 1, 1983.

Committee Comments

This rule permits the Supreme Court of the United States or the United States Court of Appeals for the Seventh Circuit to certify a question of Illinois law to the Supreme Court of Illinois, which question may be controlling in an action pending before said court and upon which no controlling Illinois authority exists.

The Court of Appeals for the Seventh Circuit has a rule which encourages certification in jurisdictions that have a rule similar to the one provided herein. See Rule 13 of the Rules of the United States Court of Appeals for the Seventh Circuit.

Subparagraph (a) establishes the standard for certification and also makes the acceptance of certification by the Supreme Court of Illinois discretionary.

Subparagraph (b) establishes the contents of a certification order.

Subparagraph (c) provides that the Supreme Court of Illinois may require the original or copies of all or any portions of the record before the certifying court.

Subparagraph (d) provides that briefs and arguments are to be governed by the Supreme Court of Illinois rules dealing with briefs and oral arguments.

Subparagraph (e) of the rule provides for fees and costs in the Supreme Court of Illinois.

AFFIDAVIT

STATE OF ILLINOIS)
COUNTY OF COOK) SS:

I, DAVID A. NOVOSELSKY, being first duly sworn on oath deposes and says:

1. That I am an attorney licensed to practice law in the State of Illinois and before the United States Court of Appeals for the Seventh Circuit.

2. I presented a portion of the oral argument on behalf of certain plaintiffs-appellees before the United States Court of Appeals for the Seventh Circuit in a case entitled "In Re Air Crash Disaster near Chicago, Illinois on May 25, 1979, Nos. 81-3083, 81-3084."

3. During the course of that argument, I was questioned by Judge Coffey as to the possibility of certifying the questions then before that Court to the Illinois Supreme Court for resolution.

4. At that time, since I was aware of the lack of any provision for certification in the rules of the Illinois Supreme Court, as well as Rule 13 of the Seventh Circuit Rules, I responded to Judge Coffey's question by stating that certification was not possible.

5. During the rebuttal to the argument presented by the appellees, one of the counsel representing the defendants-appellants was also questioned on this matter and responded that Illinois did not have a procedure by which the Seventh Circuit could certify questions of law to the Illinois Supreme Court.

FURTHER AFFIANT SAYETH NOT.

/s/ DAVID A. NOVOSELSKY

Subscribed and sworn to
before me this 14th day
of September, 1983.

/s/ DARLENE BRANDTONIES
Notary Public